

**ASSEMBLY BILL**

**No. 878**

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**Introduced by Assembly Member Caballero**

February 26, 2009

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An act to amend Sections 5956, 5956.1, 5956.2, 5956.3, 5956.4, 5956.5, 5956.6, 5956.7, 5956.8, 5956.9, and 5956.10 of, and to add Section 5956.11 to, the Government Code, relating to infrastructure financing.

LEGISLATIVE COUNSEL'S DIGEST

AB 878, as introduced, Caballero. Infrastructure financing.

Existing law permits a governmental agency to solicit proposals and enter into agreements with private entities for the design, construction, or reconstruction by, and may lease to, private entities, for specified types of fee-producing infrastructure projects. Existing law permits these agreements to provide for the lease of, or ownership of, infrastructure facilities owned by a governmental entity, but constructed by a private entity, to that private entity for a period of up to 35 years.

This bill would authorize a local governmental agency, as defined, to enter into an agreement with a private entity for financing for specified types of revenue-generating infrastructure projects. The bill would require an agreement entered into under these provisions to include adequate financial resources to perform the agreement, and would permit the agreements to lease, license, or provide other permitted uses by the governmental agency to extend for a term of up to 50 years, after which time the project would revert to the governmental agency.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Section 5956 of the Government Code is amended to read:

5956. Local governmental agencies have experienced a significant decrease in available tax revenues to fund necessary infrastructure improvements. If local governmental agencies are going to maintain the quality of life that this infrastructure provides, they must find new funding sources. One source of new money is private sector ~~investment capital~~ *financing* utilized to *study, plan, design, develop, finance, construct, maintain, improve, rebuild, repair, and operate, or any combination thereof,* infrastructure facilities. *Private sector financing may be used with public and private financing pursuant to this chapter and projects may be financed by a combination of public and private financing under this chapter. Private sector financing for a project under this section may include, but is not limited to, cash and cash equivalents, loans, debt assumption, letters of credit, capital investment, in-kind contributions of materials or equipment, construction or equipment financing, carrying of costs during construction, and any combination thereof.* Unless private sector ~~investment capital~~ *financing* becomes available to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, some local governmental agencies will be unable to replace deteriorating infrastructure. Further, some local governmental agencies will be unable to expand and build new infrastructure facilities to serve the increasing population.

SEC. 2. Section 5956.1 of the Government Code is amended to read:

5956.1. It is the intent of the Legislature that local governmental agencies have the authority and flexibility to utilize ~~private investment capital~~ *private financing or public financing, and any combination thereof,* to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities. Without the ability to utilize ~~private sector investment capital~~ *these sources of financing* to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, the

1 Legislature finds that some local governmental agencies will not  
2 be able to adequately, competently, or satisfactorily retrofit,  
3 reconstruct, repair, or replace existing infrastructure and will not  
4 be able to adequately, competently, or satisfactorily design and  
5 construct new infrastructure.

6 SEC. 3. Section 5956.2 of the Government Code is amended  
7 to read:

8 5956.2. It is the intent of the Legislature that this chapter be  
9 construed as creating a new and independent authority for local  
10 governmental agencies to utilize private sector ~~investment capital~~  
11 *financing or public financing* to study, plan, design, construct,  
12 develop, finance, maintain, rebuild, improve, repair, or operate,  
13 or any combination thereof, fee-producing infrastructure facilities.  
14 To that end, this authority is intended to supplement and be  
15 independent of any existing authority and does not limit, replace,  
16 or detract from existing authority. This chapter may be used by  
17 local governmental entities when they deem it appropriate in the  
18 exercise of their discretion. It is the intent of the Legislature that  
19 this act create no new governmental entities.

20 SEC. 4. Section 5956.3 of the Government Code is amended  
21 to read:

22 5956.3. (a) For purposes of this chapter, “governmental  
23 agency” includes a city, county, city and county, including a  
24 ~~chartered~~ *charter* city or county, school district, community college  
25 district, public district, county board of education, joint powers  
26 authority, transportation commission or authority, or any other  
27 public or municipal corporation.

28 (b) For purposes of this chapter, “private entity” includes a  
29 person, business entity, combination of persons and business  
30 entities, or a combination of business entities.

31 (c) For purposes of this chapter, “fee-producing infrastructure  
32 project” or “fee-producing infrastructure facility” means the  
33 operation of the infrastructure project or facility will be paid for,  
34 *in whole or in part*, by the persons or entities benefited by or  
35 utilizing the project or facility.

36 SEC. 5. Section 5956.4 of the Government Code is amended  
37 to read:

38 5956.4. A governmental agency may solicit proposals and enter  
39 into agreements with private entities for the design, construction,

1 or reconstruction by, and may lease to, private entities for the  
2 following types of fee-producing infrastructure projects:

- 3 (a) Irrigation.
- 4 (b) Drainage *and sanitary sewer systems*.
- 5 (c) Energy or power production.
- 6 (d) Water supply, treatment, and distribution.
- 7 (e) Flood control.
- 8 (f) Inland waterways.
- 9 (g) Harbors.
- 10 (h) Municipal improvements.
- 11 (i) Commuter and light rail.
- 12 (j) Highways or bridges.
- 13 (k) Tunnels.
- 14 (l) Airports and runways.
- 15 (m) Purification of water.
- 16 (n) Sewage treatment, disposal, and water recycling.
- 17 (o) Refuse disposal.
- 18 (p) Structures or buildings, except structures or buildings that  
19 are to be utilized primarily for sporting or entertainment events.

20 SEC. 6. Section 5956.5 of the Government Code is amended  
21 to read:

22 5956.5. Notwithstanding Chapter 10 (commencing with Section  
23 4525) of Division 5, or Part 2 (commencing with Section 10100)  
24 or Part 3 (commencing with Section 20100) of Division 2 of the  
25 Public Contract Code, the governmental agency soliciting proposals  
26 and entering into agreements with private entities for the studying,  
27 planning, design, developing, financing, construction, maintenance,  
28 rebuilding, improvement, repair, or operation, or any combination  
29 thereof, by private entities for fee-producing infrastructure projects  
30 shall ensure that the contractor is selected pursuant to a competitive  
31 negotiation process. Projects may be proposed by the private entity  
32 and selected by the governmental agency at the discretion of the  
33 governmental agency. Projects may be proposed and selected  
34 individually or as part of a related or larger project. The competitive  
35 negotiation process shall utilize, as ~~the~~ *a* primary selection criteria,  
36 the demonstrated competence and qualifications ~~for the studying,~~  
37 ~~planning, design, developing, financing, construction, maintenance,~~  
38 ~~rebuilding, improvement, repair, or operation, or any combination~~  
39 ~~thereof, of the facility of the private entity to perform the services~~  
40 *required under the agreement, including prior experience in*

*performing similar services.* The selection criteria shall also ensure that the facility be operated at fair and reasonable prices to the user of the infrastructure facility services. The competitive negotiation process shall not require competitive bidding. The competitive negotiation process shall specifically prohibit practices that may result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration, and shall specifically prohibit governmental agency employees from participating in the selection process when those employees have a relationship with a person or business entity seeking a contract under this section that would subject those employees to the prohibition of Section 87100. Other than these criteria and applicable provisions related to providing security for ~~the~~ *any required* construction and completion of the facility, the governmental agency soliciting proposals is not subject to any other *code* provisions of the ~~Public Contract Code or this code that relates~~ *Public Contract Code* relating to public procurements.

SEC. 7. Section 5956.6 of the Government Code is amended to read:

5956.6. (a) For purposes of facilitating projects, the agreements specified in Section 5956.4 may include provisions for the lease ~~of, license, or permissive use of~~ rights-of-way in, and airspace over, property owned by a governmental agency, for the granting of necessary easements, and for the issuance of permits or other authorizations to enable the private entity to construct, *maintain, rebuild, improve, or repair* infrastructure facilities supplemental to existing government-owned facilities. Infrastructure constructed by a private entity pursuant to this chapter shall, at all times, be owned by a governmental agency, ~~unless the governmental agency, in its discretion, elects to provide for ownership of the facility by the private entity during the term of the agreement.~~ *All public works constructed pursuant to this section shall comply with Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.* The agreement ~~shall~~ *may* provide for the lease, *license, or other permissive use* of those facilities to, ~~or ownership by,~~ the private entity for up to ~~35~~ 50 years. In consideration therefor, the agreement shall provide for complete reversion of the privately constructed facility to the governmental agency at the expiration of the lease, *license, or other permissive use* at no charge to the governmental agency. Subsequent to the

1 expiration of the lease ~~or ownership period~~, *license, or other*  
2 *permissive use period*, the governmental agency may continue to  
3 charge fees for use of the infrastructure facility. If, after the  
4 expiration of the lease ~~or ownership period~~, *license, or other*  
5 *permissive use period*, the governmental agency continues to lease  
6 airspace rights to the private entity, it shall do so at fair market  
7 value.

8 (b) The agreement between the governmental agency and the  
9 private entity shall include, but need not be limited to, provisions  
10 to ensure the following:

11 (1) Compliance with the California Environmental Quality Act  
12 (Division 13 (commencing with Section 21000) of the Public  
13 Resources Code). Neither the act of selecting a proposed project  
14 or a private entity, nor the execution of an agreement with a private  
15 entity, shall require prior compliance with the act. However,  
16 appropriate compliance with the act shall thereafter occur before  
17 project development commences.

18 ~~(2) Security for the construction of the facility to ensure its~~  
19 ~~completion, and contractual provisions that are necessary to protect~~  
20 ~~the revenue streams of the project.~~

21 *(2) Security for performance of the agreement and contractual*  
22 *provisions that are necessary to protect the funding and financial*  
23 *terms of the agreement.*

24 (3) Adequate financial resources of the private entity to ~~design,~~  
25 ~~build, and operate the facility, after the date of perform~~ the  
26 agreement.

27 (4) Authority for the governmental agency to impose user fees,  
28 *in whole or in part*, for use of the facility in an amount sufficient  
29 to protect the revenue streams necessary for projects or facilities  
30 undertaken pursuant to this chapter. User fee revenues, *in whole*  
31 *or in part, may be paid to the governmental agency or the private*  
32 *entity and* shall be dedicated exclusively to payment of the private  
33 entity's *and governmental agency's* direct and indirect capital  
34 outlay costs for the project, *direct and indirect costs associated*  
35 *with financing of the facility, including interest, principal,*  
36 *repayment, issuance, and refinancing costs*, direct and indirect  
37 costs associated with operations, direct and indirect user fee  
38 collection costs, direct and indirect costs of administration of the  
39 facility, reimbursement for the direct and indirect costs of  
40 maintenance, *other project-related costs*, and a ~~negotiated~~

1 reasonable return-on-investment to the private entity *as set forth*  
2 *specifically in the agreement, or included as part of the costs and*  
3 *fees, as negotiated or determined during the procurement process.*

4 (5) As a precondition to the imposition or increase of a user fee,  
5 the governmental agency shall conduct at least ~~one public hearing~~  
6 *two public hearings* at which public testimony will be received  
7 regarding a proposed user fee revenue or increase in user fee  
8 revenues. The public hearing shall precede the action by the  
9 governmental agency to actually impose a user fee or to increase  
10 an existing user fee. The governmental agency shall consider the  
11 public testimony prior to imposing a new or increased user fee.  
12 The governmental agency shall provide the following notices and  
13 utilize the following procedures:

14 (A) Notice of the date, time, and place of the meeting, including  
15 a general explanation of the matter to be considered, shall be mailed  
16 at least 14 days prior to the meeting to any interested party who  
17 files a written request with the governmental agency for mailed  
18 notice of the meeting on new or increased fees or service charges.  
19 Any written request for mailed notices shall be valid for one year  
20 from the date on which it is filed unless a renewal request is filed  
21 prior to the expiration of the one-year period for which the written  
22 request was filed. The legislative body may establish a reasonable  
23 annual charge for sending notices based on the estimated cost of  
24 providing the service.

25 (B) At least 10 days prior to the meeting, the governmental  
26 agency shall make available to the public data that supports the  
27 amount of the fee or the increase in the fee.

28 (C) (i) At least 10 days prior to the meeting, the governmental  
29 agency shall publish a notice in a newspaper of general circulation  
30 in that agency's jurisdiction stating the date, time, and place of the  
31 meeting, including a general explanation of the matter to be  
32 considered.

33 (ii) Any costs incurred by the governmental agency in  
34 conducting the meeting or meetings required by this section may  
35 be recovered from fees charged for the services that are the subject  
36 of the fee.

37 (iii) For ~~transportation infrastructure~~ projects ~~specifically~~  
38 authorized by this chapter, at least 10 days prior to the meeting,  
39 the governmental agency shall publish for four consecutive times,  
40 a notice in the newspaper of general circulation in the affected

1 area stating in no smaller than 10-point type a notice specifying  
2 the subject of the hearing, the date, time, and place of the meeting,  
3 and in at least 8-point type a general explanation of the matter to  
4 be considered.

5 (D) No local agency shall levy a new fee or service charge or  
6 increase an existing fee or service charge to an amount that exceeds  
7 the estimated amount required to provide the service for which the  
8 fee or service charge is levied and a reasonable rate of return on  
9 investment, pursuant to paragraph (4). Any action by a local agency  
10 to levy a new fee or service charge or to approve an increase in an  
11 existing fee or service charge pursuant to this chapter shall be taken  
12 only by ordinance or resolution. The legislative body of a local  
13 agency shall not delegate the authority to adopt a new fee or service  
14 charge, or to increase a fee or service charge.

15 (6) Require that if the legislative body of the governmental  
16 agency determines that fees or service charges create revenues in  
17 excess of the actual cost for which the user fee revenues are  
18 dedicated and a reasonable rate of return ~~on investment~~, pursuant  
19 to paragraph (4), those revenues shall either be applied to any  
20 indebtedness incurred by the private entity *or the governmental*  
21 *agency* with respect to the project, be paid into a reserve account  
22 in order to offset future operation costs, be paid into the appropriate  
23 government account, be used to reduce the user fee or service  
24 charge creating the excess, or a combination of these sources.

25 ~~(7) Require~~ *If the private entity operates the facility, require*  
26 *the private entity to maintain the facility in good operating*  
27 *condition at all times, including the time the facility reverts to the*  
28 *governmental agency.*

29 (8) Preparation by the private entity of an annual audited report  
30 accounting for the income received and expenses to operate the  
31 facility. The private entity shall make that report available to any  
32 member of the public for a cost not to exceed the cost of  
33 reproduction of the report.

34 (9) Provision for a buyout of the private ~~entity~~ *entity's capital*  
35 *investment* by the governmental entity in the event of termination  
36 or default before the end of the lease term.

37 (10) Provision for appropriate indemnity promises between the  
38 governmental agency and the private entity.



1 (11) Provision requiring the private entity to maintain insurance  
2 with those coverages and in those amounts that the governmental  
3 agency deems appropriate.

4 (12) In the event of a dispute between the governmental agency  
5 and the private entity, both parties shall be entitled to all available  
6 legal or equitable remedies.

7 SEC. 8. Section 5956.7 of the Government Code is amended  
8 to read:

9 5956.7. (a) The governmental agency may exercise any power  
10 possessed by it with respect to the development and construction  
11 of infrastructure projects pursuant to this chapter. Agreements for  
12 the maintenance and ~~police~~ *operation* services entered into pursuant  
13 to this chapter shall provide for full reimbursement for services  
14 rendered by the governmental agency in accordance with the terms  
15 and conditions specified in the agreement. The governmental  
16 agency may provide services for which it is reimbursed with respect  
17 to preliminary planning, environmental certification, and  
18 preliminary design of the infrastructure projects. The governmental  
19 agency may consult with legal, financial, and other consultants in  
20 the negotiation and development of the agreement. To the extent  
21 existing public utility infrastructure is necessarily required to be  
22 modified, relocated, or removed in order for an infrastructure  
23 project authorized by this chapter to be constructed, the cost of  
24 modification, relocation, or removal of the existing infrastructure  
25 shall be borne by the private entity and included as a recoverable  
26 capital cost of the project. This cost shall not be construed to  
27 include costs of increasing the capacity, or upgrading, or improving  
28 the existing public utility infrastructure.

29 (b) The private entity's responsibility to modify, relocate, or  
30 remove existing public utility infrastructure shall not alter any  
31 agreements that may be in place between the governmental agency  
32 and any public utility regarding projects funded by the  
33 governmental agency.

34 (c) In the event of a dispute regarding the reimbursement  
35 required, a private entity may request an audit of the public utility's  
36 costs by a mutually acceptable certified public accountant. The  
37 result of the audit shall determine the actual costs. If the audit  
38 indicates that the public utility's actual costs were less than 95  
39 percent of the cost claimed, the cost of the audit shall be borne by  
40 the public utility. If the audit indicates that the public utility's

1 actual costs were 95 percent or more of the cost claimed, the cost  
2 of the audit shall be borne by the private entity.

3 SEC. 9. Section 5956.8 of the Government Code is amended  
4 to read:

5 5956.8. The plans and specifications for each project  
6 constructed pursuant to this chapter shall comply with all applicable  
7 governmental design standards for that particular infrastructure  
8 project. The private entity ~~designing, constructing, operating, and~~  
9 ~~maintaining infrastructure facilities pursuant to this chapter~~  
10 *performing the agreement* shall utilize private sector design and  
11 construction firms to design and construct the infrastructure  
12 facilities. However, a facility subject to this chapter and leased,  
13 *licensed, or permitted* to a private entity shall, during the term of  
14 the lease, be deemed to be public property for purposes of  
15 ~~identification~~, maintenance, enforcement of laws and for purposes  
16 of Division 3.6 (commencing with Section 810). All ~~public works~~  
17 ~~constructed~~ *construction, alteration, demolition, installation,*  
18 *maintenance, and repair work performed* pursuant to this chapter  
19 shall comply with Chapter 1 (commencing with Section 1720) of  
20 Part 7 of Division 2 of the Labor Code.

21 SEC. 10. Section 5956.9 of the Government Code is amended  
22 to read:

23 5956.9. In order to use the authority conferred by this chapter  
24 to the maximum extent, a governmental agency may use private  
25 infrastructure financing pursuant to this chapter as the exclusive  
26 *funding or* revenue source or as a supplemental *funding* revenue  
27 source with federal or local funds. The governmental agency  
28 involved may be a local governmental agency or a combination  
29 of local governmental agencies. The governmental agency may  
30 work cooperatively with the California Infrastructure and Economic  
31 Development Board with regard to the design, construction,  
32 operation, and financing of privately financed facilities, but the  
33 projects will not be subject to the review or approval of that board.

34 SEC. 11. Section 5956.10 of the Government Code is amended  
35 to read:

36 5956.10. Notwithstanding any provision of this chapter, neither  
37 the state ~~or~~ *nor* any state agency may directly or indirectly use the  
38 authority in this chapter, nor may any governmental agency as  
39 defined in Section 5956.3, use the authority in this chapter, to

1 design, construct, finance, or operate a state project. For purposes  
2 of this section, a state project includes any of the following:

- 3 (a) Toll roads on state highways.
- 4 (b) State water projects.
- 5 (c) State park and recreation projects.
- 6 (d) State-financed projects.

7 These limitations shall not prohibit the state, any state agency,  
8 or any governmental agency as defined in Section 5956.3, from  
9 utilizing authorizations contained in other provisions of law.

10 SEC. 12. Section 5956.11 is added to the Government Code,  
11 to read:

12 5956.11. The governmental agency may determine the validity  
13 of any permits, authorizations or approvals, contracts and  
14 agreements, user fees, and other actions taken pursuant to this  
15 chapter, by initiating a validating proceeding, as provided in  
16 Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of  
17 the Code of Civil Procedure. The validating action may also be  
18 initiated by interested person as provided in Chapter 9  
19 (commencing with Section 860) of Title 10 of Part 2 of the Code  
20 of Civil Procedure.

21 SEC. 13. Except as it amends Chapter 14 (commencing with  
22 Section 5956) of Division 6 of Title 1 of the Government Code,  
23 nothing in this act shall be construed to affect the application of  
24 any other law.